SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

NO. 73-1812

HAROLD WILLIS and
CHRISTINE MATTHEWS,
Petitioners,

vs.

THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the Court of Appeal,
State of California,
First Appellate District,
Division Two

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The petition of Harold Willis and Christine Matthews respectfully shows that:

(a) The opinion of the Court of Appeal herein is unpublished. The opinion is reproduced under subdivision (i) infra. For convenience, the opinion in People v. Metzger, 22 Cal. App. 3d 338, 99 Cal. Rptr. 264 (1971) is also reproduced under subdivision (i) infra.

(b) (i) The opinion of the Court of Appeal herein was filed on January 16, 1974. Petitioners timely petitioned for a hearing in the Supreme Court of California, and the Supreme Court of California denied a hearing on March 13, 1974.

(ii) Not applicable.

(iii) Jurisdiction is conferred upon this Honorable Court to review the judgment below by writ of certiorari by 28 U.S.C. § 1257(3).

(c) Does the Fourth Amendment per-

mit police to enter a home searching for evidence, where their purpose is to defeat the expectation of privacy of a household, and they use active misrepresentation appealing to an innocent motive of a householder?

(d) AMENDMENT IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CALIFORNIA PENAL CODE § 1538.5. Motion to return property or suppress evidence

(a) Grounds. A defendant may move for the return of property or to

suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on the ground that:

(1) The search or seizure without a warrant was unreasonable; or

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

* * *

(d) Effect of granting motion. If a search or seizure motion is granted

pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

* * *

(f) Felony; motion at preliminary hearing. If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

* * *

(i) Felony; renewal of motion at special hearing; review. If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to

answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after

the denial of his motion at the special hearing.

* * *

(m) Exclusive pre-trial remedy; review on appeal after conviction. The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction

is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(e) During the second or third week of April, 1971, police arranged with Mike Bardeleben, who had narcotics charges pending against him, to enter 558 Steiner Street, San Francisco, twice. He was supposed to introduce Wolfe to the occupants to buy drugs, but was unsuccessful. (Reporter's Transcript, hereinafter "R.T.", p. 11, line 14 - p. 13, line 9; p. 14, lines 14-20; p. 17, lines 26-28; p. 19, lines 8-18; p. 20, lines 2-25.)

Thereafter, an officer went to 558 Steiner and a male answered. The

officer said that he was looking for Mike Bardeleben to buy a handmade belt. The male said that no one there made leather goods and sent Wolfe away. (R.T. p. 23, line 20 - p. 24, line 13.)

On July 1, 1971, two officers went to 558 Steiner. Petitioner Christine Matthews answered the bell. (Preliminary Hearing Transcript, hereinafter "P.H.", p. 5, line 27 - p. 6, line 9; p. 11, line 18 - p. 12, line 2; p. 19, lines 17-28.)

The officer stated that he was looking for "Mike." Miss Matthews said that she did not know the person, but that there were several people upstairs playing poker, and she admitted them so they could see if he was there. (P.H. p. 6, lines 11-21; p. 12, lines 7-24; p. 13, lines 8-10.)

Inside the premises, the officers saw contraband in the kitchen where the poker game was in progress and in an open door down the hall. (P.H. p. 6, lines 22-26; p. 8, line 19 - p. 9, line 22; p. 13, line 22 - p. 15, line 1; p. 15, lines 22-27; p. 16, lines 3-6; p. 16, lines 11-22; p. 25, line 14 - p. 26, line 4.)

The police told Miss Matthews that the person they were looking for was not there, and left. (P.H. p. 10, lines 7-11; p. 33, line 15 - p. 34, line 8; p. 38, line 17 - p. 39, line 18.)

Then the officers went down the street where three other officers were waiting. All five officers returned to 558 Steiner and the premises were secured pending the issuance and execution of a search warrant. (P.H.

p. 10, lines 12-18; p. 17, line 21 - p. 19, line 11; p. 38, lines 3-16; p. 39, lines 24-26; p. 40, lines 22-26; p. 41, line 17 - p. 43, line 3; p. 43, lines 22-28; p. 44, lines 6-17; p. 49, lines 11-28; p. 51, line 28 - p. 52, line 15; p. 52, lines 20-28; p. 53, line 1 - p. 54, line 17; p. 60, line 23 - p. 63, line 8; p. 67, line 23 - p. 68, line 13; p. 72, lines 2-4; p. 72, line 20 - p. 73, line 12; p. 73, line 22 - p. 74, line 1.)

All parties agreed that were the initial entry unlawful, the search warrant must fall. (R.T. p. 3, line 19 - p. 4, line 11; p. 7, lines 17-20.)

At the commencement of the motion to suppress in Superior Court, the court stated that if the police were not really looking for Mike Bardeleben, any consent to the entry would be viti-

ated by the deception. (R.T. p. 6, lines 8-16.) This view was in accord with the then prevailing California authorities which are cited under (h) infra.

Throughout the proceedings below, the police insisted that they really were looking for Mike Bardeleben on July 1. Mike Bardeleben has reddish hair and no beard. The police described a bearded individual to Miss Matthews when she opened the door and did not mention the reddish hair. The officer involved had had considerable opportunity to observe Mike Bardeleben before July 1. Further, the police had no reason to believe that Mike Bardeleben would be at 558 Steiner after the April entry which they arranged. (R.T. p. 13, lines 10-21; p. 14, lines 14-20; p. 15, lines 7-16; p. 18, lines 5-9;

p. 18, lines 10-13; p. 18, lines 14-20; p. 18, line 21 - p. 19, line 2; p. 21, lines 8-24; p. 22, lines 5-11; p. 22, lines 17-27; p. 23, lines 5-11; p. 24, line 24 - p. 25, line 4; p. 25, line 11 - p. 26, line 23; p. 27, lines 15-17; p. 27, lines 18-19; p. 28, lines 2-9.

The court concluded that there was no reasonable likelihood that Mike Bardeleben would be on the premises, and that a deception had been practiced. (Reporter's Transcript Augmentation, January 7, 1972, hereinafter "R.T.A.", p. 2, line 11 - p. 3, line 15; p. 4, lines 19-26; p. 6, lines 11-16.)

In ruling on the motion, the court observed, "We first started out on the theory that if there was a deception, that ended it." (R.T.A. p. 1, lines 20-22.)

However, between the testimony at the suppression hearing in Superior Court and the ruling on the motion to suppress, the Court of Appeal, First District, Division One, decided People v. Metzger, supra. The court found the Metzger case "very persuasive" (R.T.A. p. 1, lines 5-19) and, on the strength of Metzger, held that despite the deception the entry was lawful.

The Court of Appeal in the instant case held that " ... the officers in this case used a type of 'deception' as to their true motive in seeking admittance to the premises .... " (Opinion, p. 1.) However, the Court of Appeal held that since Miss Matthews admitted strangers who were purportedly looking for someone who was also a stranger to her, she exhibited no reasonable expectation of

(f) Pursuant to California Penal Code § 1538.5(a), (d), and (f), petitioners attacked the constitutionality of the search and seizure via a motion to suppress at the preliminary hearing on August 13, 1971. Pursuant to § 1538.5(i), petitioners relitigated de novo the constitutionality of the search and seizure at a special hearing in Superior Court. Although both petitioners pleaded guilty to one count of the information, petitioners appealed from the judgment on the basis that the search and seizure was unconstitutional, which appeal is provided for in § 1538.5(m). Petitioners sought a hearing in the California Supreme Court, urging the unconstitutionality of the search and seizure.

(g) Not applicable.

(h) Prior to People v. Metzger,

supra, California law was clear that police deception to obtain consent to an entry vitiated the consent and that the entry and the use of any evidence obtained thereby was prohibited by the Fourth Amendment. Please see, e.g., People v. Reeves, 61 Cal. 2d 268 (1964); People v. Mesaris, 14 Cal. App. 3d 71 (1970); In re Robert T., 8 Cal. App. 3d 990 (1970); People v. Miller, 248 Cal. App. 2d 731 (1967); People v. Porter, 227 Cal. App. 2d 211 (1964); People v. Hodson, 225 Cal. App. 2d 554 (1964).

This was turned upside down by People v. Metzger, supra. In Metzger, a police agent, who was acquainted with Metzger, obtained entry to Metzger's house by falsely representing himself to be a potential client of Metzger. The Court of Appeal in Metzger held

that Metzger was controlled by United States v. White, 401 U.S. 745, 91 S. Ct. 1122, 28 L.Ed. 2d 453 (April 5, 1971), because in each: "(1) a willing informer (2) personally known to [defendant] (3) was invited into [defendant's] home (4) by means of deception as to his motive (5) for the purpose of reporting criminal activity to Government agents (6) and but for the questioned entry no constitutional violation occurred." And, moreover, the Fourth Amendment does not protect " ... a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it ..." (p. 343).

Petitioners do not contend that one has a constitutional right, or any right, to rely upon a misplaced belief that a person to whom one voluntarily

confides his wrongdoing will not reveal it. We do strenuously contend that the entry of the police officers here and the entry of McDonald in Metzger are illegal and that the observations and search warrants which ensued are fruit of the poisonous tree.

In White, the issue was whether agents who electronically monitored conversations between White and an informant with a concealed transmitter could testify to those conversations. The plurality concluded, at U.S. 751: "If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the

agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks." And, at U.S. 753: " ... [W]e are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony, nevertheless has a Fourth Amendment privilege against a more accurate version of the evidence in question."

There were six conversations in White, only one of which occurred in White's home. White never attacked the entry, and none of the five opinions filed by the Supreme Court even mentions how the entry was effected. Thus, White is not an entry case at all.

The Court of Appeal in Metzger also relied upon Hoffa v. United States, 385 U.S. 293 (1966) and Lewis v. United States, 385 U.S. 206 (1966). Three

fundamental considerations indicate that the result should be different in the instant case from the result in Hoffa and Lewis.

First, from the standpoint of the police: In the instant case, and in Metzger, it is clear that the purpose of the police in using the deception was to obtain entry into a home in hopes of making sufficient observations to obtain a search warrant.

The Government argued in Hoffa that (1) the incriminating statements overheard by Partin could have been made anywhere and showed no logical relationship to the "fortuitous" fact that they were actually made in a constitutionally protected area; (2) therefore, the issue of a constitutionally protected area was irrelevant; (3) since the risk that statements made to another will be

repeated is probably inherent in the conditions of human society, no constitutional issue remained. Brief for the United States, pp. 124-132, summarized in Comment, 76 Yale L.J. 994, 1009 n.3 (1967). The Court was persuaded by this argument. Thus, at 385 U.S. 301-302:

> The petitioner, in a word, was not relying on the security of a hotel room; he was relying on his misplaced confidence that Partin would not reveal his wrongdoing [footnote omitted]. As counsel for the petitioner himself points out, some of the communications with Partin did not take place in the suite at all, but in the 'hall of the hotel,' in the 'Andrew Jackson lobby' and 'at the courthouse.'

Similarly, in Lewis, the Government concluded its brief with the observation, adopted by the Court as a fair summary, that: "In short, this case involves the exercise of no Governmental

power to intrude upon protected premises; the visitor was invited and willingly admitted by the suspect. It concerns no design on the part of a government agent to observe or hear what was happening in the privacy of a home; the suspect chose the location where the transaction took place ...." 385 U.S. at 212.

Second, from the standpoint of the householder: In Hoffa, according to Partin, Hoffa attempted to enlist Partin's aid in the bribery scheme on the same day that Partin initially entered the suite. 385 U.S. at 296, n.3. In Lewis, the Court observed, at 385 U.S. 211, "But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled

to no greater sanctity than if it were carried on in a store, a garage, in a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant."

In the instant case, Miss Matthews' motive in admitting the police was perfectly innocent: she was merely doing a favor for a stranger.

The leading case upholding the use of artfulness and stratagem, Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932) and the cases it cites, all relate to government agents pretending to be willing accomplices or victims. While it may be legitimate to use deception which appeals to the criminal propensities of

a suspect, the justification is absent where the deception appeals to innocent motives.

Third, expectation of privacy: While the Court of Appeal in the instant case did not rely upon Metzger (according to the May, 1974 edition of Shepard's, no reported appellate decision anywhere has ever cited Metzger), the opinion begs the question, decided in Metzger, whether the use of deceit to obtain entry is lawful.

The Court of Appeal reasoned that since Miss Matthews admitted strangers who she thought were looking for another person who was also a stranger to her, she had no expectation of privacy. This, of course, simply does not follow. No one can say how much Miss Matthews valued her privacy. All that can reliably be said is that

she valued doing a favor for a stranger more than she valued her privacy, and that when the police confronted her with a situation where she was required to choose between these values, she chose to do the favor.

The police did not eschew deception in any form; they even tried to deceive Judge Karesh into believing that they really were looking for "Mike." The deception they practiced on Miss Matthews might be thought to be a mild form of deception. The fact remains that the police chose the deception in hopes that it would work. The reasoning of the Court of Appeal boils down to saying that if the deception works it is thereby, via the expectation of privacy route, justified.

(i) In the Court of Appeal of the State of California, First Appellate

District, Division Two. People of the State of California, Plaintiff and Respondent, v. Harold Willis and Christine F. Matthews, Defendants and Appellants. 1 Crim. No. 11356 (Sup. Ct. No. 81483), filed January 16, 1974.

"THE COURT:

"Appellants contend that the search warrant under which prosecution evidence was seized was based upon information obtained through an illegal entry.

"As noted in Hoffa v. United States (1966) 385 U.S. 293, 301, 'What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, . . .' Although it is true that the officers in this case used a type of 'deception' as

to their true motive in seeking admittance to the premises, it is clear from the record that appellant Matthews, in permitting entry, did not exhibit a reasonable expectation of privacy or reliance upon the security of the premises. The officers presented themselves to her as strangers, looking for someone whose description she did not even recognize. Each of the cases relied upon by appellants is distinguishable in that the occupants of the premises in those cases did not so obviously give up any reliance upon the security of their premises, but were persuaded to act by the particular identities and associations falsely presented.

"Judgments affirmed."

People v. Metzger, 22 Cal. App. 3d 338, 99 Cal. Rptr. 264. [Crim. No.

9852, First Dist., Div. One, Dec. 23, 1971.]

"ELKINGTON, J.--Defendant Michael Metzger was charged with narcotic and other offenses by a grand jury indictment. The evidence on which the indictment was based was seized in his home under authority of a search warrant. The superior court on a Penal Code section 1538.5 motion ordered the evidence suppressed. Concededly insufficient evidence to support a conviction remained; accordingly an order dismissing the action under Penal Code section 1385 was entered. The People appeal from the dismissal order, as permitted by Penal Code section 1238, subdivision (7).

"The evidence before the superior court on the Penal Code

section 1538.5 motion to suppress may be stated as follows.

"One Gerald McDonald had been a paid informer for the United States Customs Service. He was arrested in Marin County on charges relating to possession of stolen property. Thereafter he was used by the county police authorities 'to gain information' and was paid for his services. Among other things he told the police that he had seen marijuana, cocaine and hashish at Metzger's home. Metzger, he said, would go down stairs with keys and bring back small amounts of the narcotics 'and people there would partake of it.' The officers suggested to him that he telephone Metzger, who was an attorney at law, pose as a potential client and endeavor to

be invited into the lawyer's home where he might observe and later report the presence of narcotics. McDonald made the telephone call and after some conversation was invited to come to Metzger's office the following week. However, the following afternoon McDonald went to Metzger's home and knocked on the door. Metzger opened the door and said, 'Hi Jerry.' McDonald replied, 'What's doing, Mike,' whereupon Metzger said, 'Come on in.' 'During his conversation with the said Michael Metzger, he observed Metzger produce a handrolled cigarette and smoke the same. He recognized the cigarette from its odor and appearance to be a marijuana cigarette. The confidential reliable informant has used marijuana

himself in the past and has observed marijuana on numerous occasions and is well familiar with its appearance and its odor.' McDonald thereafter reported his observation to the officers; when he did, they smelled the odor of marijuana smoke on his clothing. He was in fact a 'reliable informer, having given the police truthful information in the past. He was paid $50 for the Metzger job; besides that he was promised nothing by the officers. The officers made no deal to dismiss the receiving stolen property charge against him; this charge was nevertheless later dismissed.

"Metzger contends that a Fourth Amendment violation resulted from the means used in securing entry into his home. No contention is

made of an invalid search or seizure or other constitutional breach after the entry, as condemned in Gouled v. United States, 255 U.S. 298 [65 L.Ed. 647, 41 S.Ct. 261]. After the entry McDonald observed only that which was in plain sight; such an observation is not a search. (People v. Roberts, 47 Cal. 2d 374, 379 [303 P.2d 721]; People v. Jackson, 14 Cal. App. 3d 57, 66-67 [92 Cal. Rptr. 91].)

"Police practices such as are here in question have been called 'dirty business' and are offensive to many people. Nevertheless they may not reasonably be considered as unrelated matters, but rather in the context of the unquestioned need to cope with growing criminal aggression in our state and nation. And because our decisions announce law

which is generally applicable, care should be taken that we be not swayed by persons, or kinds or levels of criminal activity, and thus create bad law.

"Although, as is well known, many police practices have been found constitutionally impermissible, there is nothing inherently unlawful in the use of police deceit for the purpose of suppressing crime and apprehending criminals. A rule, which so far as we know has never been questioned, was stated in 1932 by Chief Justice Hughes in Sorrells v. United States, 287 U.S. 435, 441-442 [77 L.Ed. 413, 416-417, 53 S.Ct. 210, 86 A.L.R. 249], as follows: 'Artifice and stratagem may be employed to catch those engaged in criminal enterprises. . . . The

appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. . . .'

"Yet when the police 'artifice' or 'stratagem' has the effect of invading guaranteed constitutional rights, it must be so held, and any evidence obtained as a result must be suppressed.

"The factual situation presented to us may reasonably be condensed to the following. Law enforcement authorities arranged for (1) a willing informer (2) who was person-

ally known to one suspected of engaging in criminal activity (3) to be invited into the home of that person (4) by means of deception as to his motive (5) for the purpose of observing such criminal activity and reporting it to the authorities, (6) which information, but for the questioned entry, was not unconstitutionally obtained.

"Our task is to determine which side of the line between permissible, and constitutionally proscribed, police activity the facts of this case fall. That line is not easily found; it has been the subject of conflicting decisions and discussion, and many reasonable men have disagreed.

"In our inquiry the controlling authority on the constitutional

issue involved is, of course, the United States Supreme Court (Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209 [75 L.Ed. 983, 51 S.Ct. 453]; Perkins Mfg. Co. v. Jordan, 200 Cal. 667, 678–679 [254 P. 551]); and as to that court, its later decisions must be deemed to have superseded any earlier contrary authority. (Asher v. Texas, 128 U.S. 129, 131 [32 L.Ed. 368, 369, 9 S.Ct. 1]; Estate of Keig, 59 Cal. App. 2d 812, 816-817 [140 P.2d 163]; People v. Bateman, 57 Cal. App. 2d 585, 587 [135 P.2d 192].)

"United States v. White (1971) 401 U.S. 745 [28 L.Ed.2d 453, 91 S. Ct. 1122], appears to be the most recent relevant authority. In that case a willing informer who was known to White, concealing his pur-

pose and police connections, by invitation entered the home of White, whom he engaged in incriminating conversations which were transmitted to outside police by means of a concealed electronic device. No Fourth Amendment intrusion was found. Citing Lewis v. United States, 385 U.S. 206 [17 L.Ed.2d 312, 87 S.Ct. 424], the court said (p. 749 [28 L.Ed.2d at p. 457]), 'No warrant to "search and seize" is required in such circumstances, nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics . . . .' In such a situation, it was stated, where one trusts an apparent colleague '. . . "no interest legitimately protected by the Fourth Amendment is involved,"

for that amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Hoffa v. United States [385 U.S.] at 302, . . .'

"We are unable to observe any substantial distinguishable factual difference between United States v. White and the case before us. There also (1) a willing informer (2) personally known to White (3) was invited into White's home (4) by means of deception as to his motive (5) for the purpose of reporting criminal activity to government agents, (6) and but for the questioned entry no constitutional violation occurred.

"Hoffa v. United States (1966) 385 U.S. 293 [17 L.Ed.2d 374, 87 S.

Ct. 408], was relied upon by the court in United States v. White. One Partin, a union official and a government informer, was personally known to Hoffa. 'Deceptively' (as to his purpose and government connections) Partin and government agents arranged for him to be in Hoffa's 'hotel suite by invitation' [footnote omitted] over an extended period of time for the purpose of observing and reporting any criminal activity of Hoffa. In the hotel suite Partin observed criminal activity of Hoffa which he reported to the agents. It was urged that the admission at Hoffa's later trial of evidence of Partin's observations was, because of the 'deceptive' means used to gain entry to Hoffa's suite and presence, violative of the

Fourth Amendment. Here again although the factual context also closely parallels that of the case at bench, no Fourth Amendment violation was found.

"The court pointed out that (p. 302 [17 L.Ed.2d at p. 362]): 'Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing. . . .' It was then stated: 'Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to

whom he voluntarily confides his wrongdoing will not reveal it. . . .'

"On Lee v. United States (1951) 343 U.S. 747 [96 L.Ed. 1270, 72 S.Ct. 967]: On Lee, a laundryman, had his living quarters in the rear of the laundry. Suspicious of his dealings, the government employed On Lee's 'old acquaintance and former employee,' Chin Poy, as a 'stool pigeon.' Chin Poy on several occasions 'sauntered in and, while customers came and went,' engaged On Lee in incriminating conversations which were transmitted by radio to outside agents. The court said (pp. 751-752 [96 L.Ed. at p. 1274]) that the conduct of the government and Chin Poy 'did not amount to an unlawful search and seizure such as is proscribed by the Fourth Amend-

ment. . . . Chin Poy entered a place of business with the consent, if not by the implied invitation" of On Lee.

"From the foregoing high authority, which is wholly binding upon us, it becomes clear that no Fourth Amendment taint attended the means by which, in the case before us, McDonald gained entry into defendant Metzger's home.

"Support for Metzger's contention is claimed in the earlier case of Gouled v. United States, supra, 255 U.S. 298. But there the factual context is completely dissimilar from those of the foregoing authorities and of the case at bench. A business acquaintance of Gouled, acting under orders of federal officers, gained entry into

Gouled's office by falsely pretending to pay a social visit. The intruder then secretly ransacked the office finding incriminating documents. It was this latter conduct, clearly a constitutionally banned governmental search and seizure, that the court found objectionable. (And see discussion of Gouled in Lewis v. United States, supra, 385 U.S. 206, 209-210 [17 L.Ed.2d 312, 315].) Here the informer McDonald entered upon no search or seizure within the home; he did no more than observe Metzger engage in criminal activity.

"We now consider other authority relied upon by Metzger.

"People v. Reeves, 61 Cal.2d 268 [38 Cal. Rptr. 1, 391 P.2d 393], in no way contradicts the holdings

of White, Hoffa and On Lee. In Reeves a hotel manager was induced by police to advise a room tenant falsely that an expected registered letter had arrived downstairs. As the tenant's door was opened police waiting outside observed narcotics inside. In no sense could the police be considered invitees of the hotel guest. No trust was reposed in an apparent friend or colleague, nor was there a 'wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.' (See United States v. White, supra, 401 U.S. 745.)

"The reliance on People v. Mesaris, 14 Cal. App. 3d 71 [91 Cal. Rptr. 837], In re Robert T., 8 Cal. App. 3d 990 [88 Cal. Rptr. 37], People v. Miller, 248 Cal. App. 2d

731 [56 Cal. Rptr. 865], People v. Porter, 227 Cal. App. 2d 211 [38 Cal. Rptr. 621], Fraternal Order of Eagles, No. 778 v. United States, 57 F.2d 93, United States v. Reckis, 119 F.Supp. 687, United States v. Guerrina, 112 F.Supp. 126, United States v. Mitchneck, 2 F.Supp. 225, is also misplaced. In none of these cases was there the 'misplaced belief that a person to whom [one] voluntarily confides his wrongdoing will not reveal it.' In Mesaris, plainclothes police gained entrance by pretending a need to talk to a repairman in the house. Robert T.'s plainclothes policeman named 'Melvin' was introduced as '"My friend Joe"' by the landlord; he walked into the apartment with the landlord pretending a check to see if the tenant had 'sublet'. In

Miller, police went to his room with the landlord who knocked and said, '"You have a caller."' Police saw narcotics when the door was slightly opened. In Porter, police and federal agents rang a door bell and then answered '"Yes"' to the question '"Is that you, Bill?"' In Fraternal Order of Eagles, prohibition agents falsely gained entrance by posing as brother Eagles. In Reckis a federal agent gained entry by saying, 'The boss sent me down to fix the still.' Guerrina concerned an invited civil tax agent who surreptitiously brought in a criminal agent for a criminal investigation. And in Mitchneck, prohibition agents gained entry by falsely posing as refrigerator salesmen having mutual acquaintances

with Mitchneck.

"Metzger's secondary contention in the superior court Penal Code section 1538.5 proceedings was that the affidavit purporting to support the subject search warrant was insufficient as a matter of law.

"As relevant, the affidavit dated December 6, 1970, of a police officer, alleged receipt of information from a person, previous information from whom had been correct and reliable and had twice resulted in arrests. The informer related to the officer: that on two occasions in June and July 1970 he had 'observed small quantities of hashish, marijuana and cocaine being used by the occupants of [Metzger's] residence, all of which had been produced by the said Michael Metzger'; that

on or about December 6, 1970, he was in the residence of Metzger for about one-half hour during which time he observed Metzger produce a hand-rolled cigarette and smoke the same; that he recognized the cigarette from its odor and appearance to be a marijuana cigarette; and that he 'has used marijuana . . . on numerous occasions and is well familiar with its appearance and its odor.' The police officer affiant himself alleged that when the informer exited [from] the residence he [the officer] could detect upon [the informer's] person and clothing the odor of burned marijuana which was not present when he entered the residence.'

"Metzger's argument is that from the allegations that he 'pro-

duced' the described narcotics in his home it could not reasonably be inferred that additional narcotics were to be found therein. The superior court found against Metzger on this issue, concluding that the affidavit 'probably is sufficient.' We find ourselves in agreement with the superior court.

"In making this determination we are bound by certain rules recently reiterated in Skelton v. Superior Court, 1 Cal. 3d 144, 150 [81 Cal. Rptr. 613, 460 P.2d 485] as follows: '[W]hen a search is based on a warrant (and therefore on a magistrate's rather than a police officer's determination of probable cause) the reviewing courts "will accept evidence of a less 'judicially competent or persuasive character than would have

justified an officer in acting on his own without a warrant.' . . ." In determining the sufficiency of an affidavit for the issuance of a search warrant the test of probable cause is approximately the same as that applicable to an arrest without a warrant, a commitment by a magistrate or an indictment by a grand jury . . . , namely, whether the facts contained in the affidavit are such as would lead a man of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion of the guilt of the accused. . . . The rules of appellate review recognize the impracticality of establishing a precise calculus by which the existence of probable cause is to be determined: the warrant can be

upset only if the affidavit fails as a matter of law to set forth sufficient competent evidence supportive of the magistrate's finding of probable cause, since it is the function of the trier of fact, not the reviewing court, to appraise and weigh evidence when presented by affidavit as well as when presented by oral testimony.'

"Here a reliable police agent, six months before in Metzger's home, had seen Metzger produce three kinds of narcotics which were then used by the building's occupants. On the day of the affidavit he had again seen Metzger produce and use a narcotic in his home. We cannot say, as a matter of law, that the magistrate as an ordinarily prudent and cautious man could not 'believe,

and conscientiously . . . entertain, a strong suspicion' that narcotics were being kept by Metzger in his home. It is true as argued by Metzger that the narcotics could have been produced from his person, and not otherwise from within his home. But the magistrate could reasonably have inferred that Metzger, a lawyer, did not customarily carry narcotics on his person.

"The order of dismissal is reversed.

"Molinari, P.J., and Sims, J., concurred.

"Respondent's petition for a hearing by the Supreme Court was denied March 8, 1972. Peters, J., and Tobriner, J., were of the opinion that the petition should be granted."

(j) Petitioner Matthews was placed on probation for 3 years with a condition that she serve 6 months in the county jail. The jail term has been served. Petitioner Willis was sentenced to state prison. He is presently enlarged upon bail pending appeal.

"Superior Court of the State of California for the City and County of San Francisco.

"The People of the State of California vs. Harold Willis, Defendant.

"No. 81483.

"Nature of Proceedings: Sentence to State Prison

"Defendant is present with counsel, G. Glass

"This cause comes on regularly this day for: Sentence

"The defendant having been convicted of the crime of felony, to-wit: Vio.

Sec. 11530.5 H&S

"The Court orders that probation is denied.

"It is therefore ordered, adjudged and decreed that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law.

"Defendant remanded to the custody of the Sheriff to be delivered into the custody of the Director of Corrections at Vacaville, California.

"The Court grants the Defendant's Motion to set bail pending appeal. The Court sets bail at $2500 and orders bail originally posted be transferred to bail set this date, pending appeal.

"Dept. 24, Date 9/5/72, Pg. 113.

"Attest (signed) Marie Fakoury, Deputy Clerk."

"Superior Court of the State of

California for the City and County of San Francisco.

"The People of the State of California vs. Christine F. Matthews, Defendant.

"No. 81483.

"Nature of Proceedings: Sentence to State Prison, suspended.

"Defendant is present with counsel, G. Glass

"The defendant having been convicted of the crime of felony, to-wit: Vio.Sec. 11530.5 H&S

"It is therefore ordered, adjudged and decreed that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law

"The Court orders that execution of the sentence herein imposed is suspended and that the defendant is placed

on probation for a period of 3 years, subject to the following terms and conditions, to-wit: Defendant shall be confined in the County Jail for the term of 6 months.

"Defendant remanded to the custody of the Sheriff.

"The Court orders bail exonerated.

"Dept. 24, Date 9/5/72, Pg. 114.

"Attest (signed) Marie Fakoury, Deputy Clerk."

For the foregoing reasons, it is respectfully submitted that a petition for certiorari herein should be granted.

Dated: _____

ROMMEL BONDOC,

Attorney for Petitioners